

STATE OF TENNESSEE

OFFICE OF THE
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Opinion No. 00-153

County employee - member of county legislative body

QUESTIONS

1. Is a member of a county legislative body an employee of the county?
2. Does membership on a county legislative body constitute “employment” as that term is generally defined by state law?
3. Does the compensation received by a member of a county legislative body as authorized by Tenn. Code Ann. § 5-5-107 constitute salary or wages or is it a per diem payment based upon attendance at regular sessions of the county legislative body or duly authorized committees thereof?

OPINIONS

1 and 2. Although the determination whether a particular position is one of “employment” must be made on a case-by-case basis depending on the particular factual and legal context in which the question arises, membership on a county legislative body would not qualify as a position of “employment” as that term is usually utilized in state statutes.

3. Tenn. Code Ann. § 5-5-107 gives a county legislative body the option of compensating its members either in the form of a per diem payment based on attendance or in the form of a stated salary per month.

ANALYSIS

1 and 2. Your first two questions are essentially the same. They ask whether a member of

a county legislative body is an employee of the county, or phrased another way, does membership on a county legislative body constitute “employment” as that term is generally defined. The determination of whether a position is “an office” or “employment” is one to be made on a case-by-case basis. *See Glass v. Sloan*, 198 Tenn. 588, 281 S.W.2d 397 (1955). We have found no Tennessee cases specifically defining the terms “employee” or “employment”. However, an “employee” is defined, for purposes of the Workers’ Compensation Act, as “every person . . . in the service of an employer . . . under any contract of hire or apprenticeship, written or implied.” Tenn. Code Ann. § 50-6-102(9)(a). Under such definition, a member of a county legislative body would not appear to be an employee because he or she is not providing any services to an employer “under any contract of hire or apprenticeship,” but rather, is performing the functions and duties authorized by state law.

Similarly, the only definition for the term “employment” that could be found under state law was in the Tennessee Employment Security Act, for purposes of determining unemployment compensation. “Employment” is defined in that Act, as

. . . service that meets all of the following conditions:

- (1) It is within any category of “included service” as listed in subsection (b);
- (2) It is not within any category of “excluded service” as listed in subsection (c); and
- (3) It is within any category of “Tennessee service” as listed in subsection (d).

Tenn. Code Ann. § 50-7-207(a). Thus, if a service does not meet all three of these conditions, it is not considered employment, at least for purposes of unemployment compensation.

Subsection (c) of the statute sets forth those services that are considered to be “excluded services”. Included therein are services performed “. . . in the employ of a governmental entity referred to in subdivision (b)(3) if such service is performed by an individual in the exercise of duties . . . [a]s an elected official; [a]s a member of a legislative body, or a member of the judiciary, of a state or political subdivision . . .” The “governmental entity” referred to in subdivision (b)(3) is the state or any of its instrumentalities, or any political subdivision thereof or any of its instrumentalities. Thus, under this definition, the services provided by members of a county legislative body would not be considered “employment”, at least for purposes of unemployment compensation, as members of a county legislative body are elected. *See* Tenn. Code Ann. § 5-5-102(e)(2).

As noted above, the determination of whether a position is “an office” or “employment” is one to be made on a case-by-case basis. Our courts have recognized that a “public officer” is an “individual who has been appointed or elected in a manner prescribed by law, who has a designation or title given him by law, and who exercise the functions concerning the public assigned to him by law.” *Sitton v. Fulton*, 566 S.W.2d 887, 889 (Tenn. Ct. App. 1978) (quoting C.J.S. *Officers* § 2); *see also Gamblin v. Town of*

Bruceton, 803 S.W.2d 690 (Tenn.Ct. App. 1990)(town recorder was officer not employee when city charter provided for position's appointment by Board of Aldermen).

Members of a county legislative body are elected in a manner prescribed by law. See Tenn. Code Ann. § 5-5-102 (e) and (h). State law also provides that members of a county legislative body be known individually as "county commissioners" and collectively as the "board of county commissioners." Tenn. Code Ann. § 5-5-102(f). State law further authorizes members of a county legislative body, among other things, to appoint commissioners for towns, toll bridges and other public improvements (Tenn. Code Ann. § 5-5-120); to erect, control and dispose of public county buildings (Tenn. Code Ann. § 5-5-121); to lay any tax to build, extend or repair any courthouse, jail or public office for county purposes (Tenn. Code Ann. § 5-5-122); and to prohibit or restrict the consumption of any alcoholic beverage or beer in public parks or recreation areas not within the corporate boundaries of a municipality (Tenn. Code Ann. § 5-5-127). In light of these statutory provisions and the applicable caselaw, members of a county legislative body should be deemed "public officers" of the county, rather than mere "employees" of the county.

This conclusion is further supported by the provisions of Tenn. Code Ann. § 5-5-102(c)(1) and Tenn. Code Ann. § 12-4-101(c). Tenn. Code Ann. § 5-5-102(c)(1), which deals with membership of a county legislative body, provides that

[n]otwithstanding any provision of the law to the contrary, ***any county employee***, otherwise qualified to serve as a member of the county legislative body, ***shall not be disqualified from such legislative office by reason of being a county employee***. (Emphasis added).

Clearly, at least for purposes of this provision, the Tennessee General Assembly does not consider a member of a county legislative body to also be an employee of the county.

Tenn. Code Ann. § 12-4-101(c), which addresses conflict of interest of public officers, provides further indication that the General Assembly does not consider members of a county legislative body to be county employees.

(c)(1) Any member of a local governing body of a county or a municipality ***who is also an employee of such county or municipality and whose employment predates the member's initial election or appointment to the governing body of the county*** or municipality may vote on matters in which the member has a conflict of interest . . .

(2) Any member of a local governing body of a county or municipality ***who is also an employee of such county or municipality and whose employment began on or after the date on which the member was initially elected or appointed to serve on the governing body of the county*** or municipality shall not vote on matters in which the member has

a conflict of interest. . . . (Emphasis added).

3. Your second question asks whether the compensation received by the members of a county legislative body constitutes salary or wages, or is instead a per diem payment based upon attendance at regular sessions of the county legislative body or duly authorized committees thereof.

Tenn. Code Ann. § 5-5-107(a) provides that the “several county legislative bodies are authorized to fix the compensation of their membership in attending sessions of the county legislative body and duly authorized committees thereof.” Subsection (b) sets forth the minimum amount of compensation to be paid, based upon the county’s classification in accordance with § 8-24-101. County legislative bodies can, however, pay a greater amount or can pay a stated salary per month, if done pursuant to a duly adopted resolution.

(c) The amount provided in this section, or a greater amount provided by resolution duly adopted by the county legislative body, shall be paid to the members for each day’s attendance at meetings of the body or any duly authorized committee thereof, or a greater amount provided by resolution duly adopted by the county legislative body as a stated salary per month.

Thus, a county legislative body is given the option of compensating its members either in the form of a so-called “per diem” payment for each day’s attendance at regular and committee meetings or in the form of a stated salary per month.

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